Supreme Court, U.S.
FILED

97 2033 APR 22 1998

OFFICE OF THE CLERK

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Christina M. Grimes
Petitioner

v.

William E. McAnulty, Judge
Jefferson Circuit Court

And

Commonwealth of Kentucky

Petition for a Writ of Certiorari from the Supreme Court of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

Richard D. Heideman
The Heideman Law Group, P.C.
1714 N Street, N.W.
Washington, DC 20036
(202) 462-8990
Counsel for Petitioner

10 pp

QUESTIONS PRESENTED

1. Whether the defenses of accident and self-defense are "mutually-exclusive" and therefore cannot both be presented to a jury, and thereby created manifest necessity to declare a mistrial over the defendant's objection?

2. Whether the Fifth and Sixth Amendments of the United States Constitution is violated when a trial court holds that a defendant must testify to intentionally killing the decedent in order to claim a self-protection defense?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION INVOLVED. . 1

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING THE WRIT. 10

I. THE KENTUCKY SUPREME COURT'S HOLDING THAT THE DEFENSES OF ACCIDENT AND SELF-DEFENSE ARE "MUTUALLY EXCLUSIVE" AND CANNOT BOTH BE PRESENTED TO A JURY VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY AND CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS 10

II. THE KENTUCKY SUPREME COURT'S HOLDING THAT A DEFENDANT MUST TESTIFY TO INTENTIONALLY KILLING THE DECEDENT IN ORDER TO INTRODUCE SELF-DEFENSE EVIDENCE OF PRIOR DOMESTIC VIOLENCE ABUSE VIOLATES THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY AND CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

Commonwealth v. Wilson, 639 A.2d 1994 (Pa. Super. 1994). 13
Merrit v. State, 213 S.W. 941 (Tex. Crim. App. 1919) 13
Pace v. Commonwealth, 561 S.W.2d 664 (Ky. 1978) 9
People v. Everette, 565 N.E.2d 1295 (Ill. 1990). 11
Smith v. Commonwealth, 89 S.W.2d 3 (Ky. 1930) 11
State v. Abeyta, 901 P.2d 164 (N.M. 1995) . . . 11
State v. Eldridge, 554 S.W.2d 422 (Mo.Ct. App. 1977) 13
State v. Hill, 744 P.2d 1228 11
State v. Kutnyak, 685 P.2d 901 (Mt. 1984) 19
State v. McCaskill, 387 S.E.2d 268 (S.C. 1990) 11
State v. Peal, 463 S.W.2d 840 (Mo. 1971) 11
State v. Seliskar, 498 N.E.2d (Oh. 1973) 19
Turner v. State, 418 S.E.2d 52 (Ga. 1992) 11
Williams v. State, 915 P.2d 371 (Ok. 1996) . 18,19

Statutes

28 U.S.C. §1254(1) 1
K.R.S. § 507.020 2

Constitutional Provisions

U.S. Const. Amend. V. 1,10,11,17,19
U.S. Const. Amend. VI 17, 19
Kentucky Const. Amend. V. 10,11, 17,19
Kentucky Const. Amend. VI 17, 19

PETITION FOR WRIT OF CERTIORARI

Christina M. Grimes petitions for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (App. 1-36) is reported at 957 S.W.2d 223. The Commonwealth of Kentucky Court of Appeals rulings (App. 39-40) and Jefferson County Circuit Court rulings (App. 43-47) are unreported.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on October 2, 1997. A timely petition for rehearing was denied on January 22, 1998. (App. 37-38). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to United States Constitution provides in part: "[N]or shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property with due process of law . . . ."

STATEMENT OF THE CASE

On September 14, 1992 a Jefferson County grand jury returned a single count indictment against petitioner Christina M. Grimes, charging Ms. Grimes with committing the offense of Murder. The indictment charged "that on or about the 2nd day of July, 1992, in Jefferson County, Kentucky, the petitioner committed the offense of Murder by intentionally or under circumstances manifesting extreme indifference to human life, wantonly causing the death of James Grimes", a violation of K.R.S. § 507.020.

The indictment charged the Ms. Grimes with capital murder, but the trial court sustained petitioner's

pre-trial motion to dismiss the capital portion of the charge.

On July 12, 1994 and continuing through July 22, 1994 a jury trial was conducted in Jefferson County Circuit Court. During the prosecution's case in chief they presented evidence that the petitioner acted on the night of July 2, 1992 with the intent to kill her husband. Such evidence that included admission of a) 911 dispatch tapes, b) EMS dispatch tapes and c) taped and oral statements obtained as confessions of the petitioner. The prosecution called investigating and interrogating police officers, 911 and EMS personnel, weapons experts and the county medical examiner, all to provide testimony in support of the Commonwealth's contention, set forth in their opening statement, that the petitioner intentionally shot and killed her husband. At the conclusion of the Commonwealth's case in chief, the petitioner moved for a Directed Verdict of Acquittal arguing that the

Commonwealth had not presented sufficient evidence of an intentional crime to justify proceeding with the trial. The trial court ruled that there was sufficient evidence of an intentional crime, and therefore the trial proceeded with the petitioner's (defense) case in chief.

The petitioner called a series of witnesses to testify with regard to the decedent's prior treatment of the petitioner and her children. Significant testimony was provided and evidence was introduced which detailed the 20 years of domestic violence the petitioner had endured prior to the decedent's demise. In addition, an expert witness testified that the petitioner suffered from Battered Spouse Syndrome as a result of witnessing and experiencing years of verbal, physical and sexual abuse on herself and her children, all at the hands of her husband, the decedent, including but not limited to the petitioner having previously been shot at by her police officer husband with his police revolver. Finally as the last defense

witness, the petitioner, Christina M. Grimes testified with regard to the charges against her. In her testimony, the petitioner described the years of abuse she suffered. She testified to the prior threats made by the decedent to the lives of the petitioner and her children and to the events of the night in question. The petitioner described how on the evening of the incident, the decedent dragged the petitioner outside in the rain, by her hair, naked. She testified that once she saw the decedent leave, she ran back into the house, put on a robe and called her daughter to call 911. The decedent then returned to the house, took his loaded police handgun, pointed the gun at himself and the petitioner, threatening both of their lives. She testified that she begged the decedent not to use the gun, to give the gun to her, and that the decedent finally did agree to give up the gun. The petitioner and her counsel demonstrated for the jury how the gun was handed to her, and how the gun went off. In her

testimony, the petitioner never used the word "accident" or the word "intentional". Immediately following the conclusion of the direct testimony of the petitioner, and prior to any cross-examination, the prosecution made an oral motion for a mistrial. After briefly hearing arguments on the motion that day, the trial court, warning the prosecution that if a mistrial was granted jeopardy may attach, issued its written ordered the following morning granting the mistrial, and ordering the matter be set for a new trial. This order was entered on July 25, 1994. (App. 47).[1]

Believing that a second trial would clearly violate her double jeopardy rights under the Constitution of the United States and the Constitution of the Commonwealth of Kentucky, the Petitioner immediately filed an appeal of the retrial order with the Kentucky Court of Appeals. Said appeal was

---

[1] No second trial has been held and none is presently scheduled. The petitioner remains free on bond pending the completion of all appeals.

dismissed as not having been taken from a final and appealable Order. (App.41-42).

The Petitioner then sought relief from the Commonwealth of Kentucky Court of Appeals in the form of a Writ of Prohibition, to prohibit a second trial from taking place. In the Writ of Prohibition, the Petitioner raised issues, inter alia, that should the court permit another trial of the petitioner, the second trial would be a violation of the petitioner's Fifth Amendment double jeopardy rights and due process rights. Petitioner argued that the trial court's ruling to grant the mistrial would violate the petitioner's constitutional due process right to present different theories of defenses. Petitioner also argued that the trial court's ruling violated her Fifth Amendment right to be free from being compelled to testify against herself. The petitioner argued that because the trial court had essentially ruled that the only way petitioner would (or should) have been entitled to a self-

protection jury instruction would have been if the petitioner had put forth affirmative evidence that she intentionally fired the gun that caused the decedent's death. The trial court was effectively requiring her to testify in her own defense. Finally, the petitioner argued that any second trial that would be initiated would be a violation of petitioner's right to be free from being twice placed in jeopardy for the same offense, as there was in this case no manifest necessity for the trial court, after the petitioner testified, to have granted the mistrial. The Commonwealth of Kentucky Court of Appeals denied the Writ without comment on July 18, 1995. (App.39-40).

The petitioner pursued a timely appeal to the Kentucky Supreme Court on September 15, 1995. In her appeal the Petitioner again argued that by denying her writ of prohibition, and allowing the Commonwealth to retry her, the Court would be violating the Petitioner's fifth amendment rights to due

process and protection from being twice placed in jeopardy for the same offense, further arguing as set forth above. On October 2, 1997 the Kentucky Supreme Court affirmed the ruling of Court of Appeals in a 4-3 decision (App. 1-36).

In its written and published opinion the Kentucky Supreme Court rejected the petitioner's contentions and held that the petitioner would not be subjected to double jeopardy because manifest necessity existed when the trial court granted the prosecution's request for a mistrial albeit over the petitioner's strenuous objection. (App. 15). Moreover, the Kentucky Supreme Court also held that the defenses of self-defense and accident are "mutually exclusive" (emphasis added) and overruled its long-standing precedent of Pace v. Commonwealth, 561 S.W.2d 664 (Ky. 1978). (App. 14). The Kentucky Supreme Court failed to specifically address the self-incrimination issue.

The petitioner sought rehearing by the Court. Specifically the petitioner argued that the court had overlooked the considerable evidence supporting her right to present both the defenses of accident and self-protection and the considerable authority from other jurisdictions which permit both defenses to be presented to the jury. The Kentucky Supreme Court denied the petition for rehearing without comment. (App. 37).

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY SUPREME COURT'S HOLDING THAT THE DEFENSES OF ACCIDENT AND SELF-DEFENSE ARE "MUTUALLY EXCLUSIVE" AND CANNOT BOTH BE PRESENTED TO A JURY VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY AND CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

The Kentucky Supreme Court's decision holding the defenses of self-defense and accident to be "mutually exclusive" and therefore holding that they cannot both be presented to a jury violates the petitioner's fifth amendment rights to due process and is in conflict with the holdings of other state courts.

The right of an accused in a homicide case to have a jury instructed as to both accident and self-defense is a right that has been recognized by a significant number of states across the country. Based on the premise that an accused is entitled to an instruction on any defense which the evidence tends to support, Smith v. Commonwealth, 89 S.W.2d 3 (Ky. 1930), this is true even when the defenses appear to be inconsistent. State v. Peal, 463 SW2d 840 (Mo. 1971). Jurisdictions throughout the country have recognized a defendant's right to present alternative theories of defense. See e.g. State v. Abeyta, 901 P.2d 164 (N.M. 1995)(when evidence supports party's

theory of case, that party is entitled to submit proper instructions regarding that theory to the jury and jury instructions may be given on both self defense and manslaughter); Turner v. State, 418 S.E.2d 52 (Ga. 1992)(defenses of accident and self-defense are not per se mutually exclusive and a murder defendant is entitled to jury instructions on the law of both accident and self-defense); State v. McCaskill, 387 S.E.2d 268 (S.C. 1990)(homicide can be excused if a defendant lawfully armed herself in self-defense because a threat to her safety was created by the victim, and the defendant's gun accidentally discharged, the willful act of taking control of a weapon did not foreclose the defense of accidental shooting); People v. Everette, 565 N.E.2d 1295 (Ill. 1990)(a homicide defendant is entitled to an instruction on self defense where there is evidence, if believed by a jury, to support said defense, even where the defendant testifies he accidentally killed the victim); State v. Hill, 744 P.2d 1228 (Kan.

1987)(trial court was required to instruct on self defense when there is any evidence of self defense, even if there is evidence that the shooting occurred unintentionally); Commonwealth v. Wilson, 639 A.2d 1194 (Pa. Super. 1994)(a reasonable jury can conclude that while defending himself, a shooting was accidental in nature and therefore be entitled to a jury instruction on self defense, the defendant's testimony as to the accidental discharge of the gun did not negate any of the elements of self-defense); State v. Eldridge, 554 S.W.2d 422 (Mo. Ct. App. 1977)(an accused is entitled to instructions on both the defenses of accident and self-defense, where the evidence would support either theory); Merritt v. State 213 S.W. 941 (Tex. Crim.App. 1919).

By holding that the petitioner was not entitled to present both the defenses of accident and self-defense, even when there was testimony which would allow a jury to reasonably believe either theory and

essentially denying a spousal victim of domestic violence the opportunity to present such evidence to the jury, the Kentucky Supreme Court has denied the Petitioner the right to present every proper defense to the charges pending against her. The Court should grant the writ of certiorari to resolve the split among the states as to whether a defendant may present the different theories of self-defense and accident in her defense. In this case, the petitioner was charged with an indictment which read that the petitioner committed the offense of murder by "intentionally or with extreme indifference to human life, wantonly" causing the death of the victim. The petitioner was then required in a single trial to simultaneously defend both the intentional and wanton aspects of the indictment. The petitioner's pre-trial motion to dismiss the indictment claiming same to be inconsistent and prejudicial was overruled. The petitioner presented evidence of the long-standing abuse, that she was in

imminent fear for her life. In addition to the testimony put on by the petitioner, the jury heard the indictment language alleging that the Plaintiff intentionally or (emphasis added) wantonly caused the death of her husband and much evidence of the intentional nature of the incident during the prosecution's case in chief. It is in cases such as these where despite the appearance of inconsistency, defendants must be allowed to present to the jury, as the trier of facts, evidence of such defenses that apply including both self-defense and accident. The prosecution having heard (and seen) the petitioner's testimony and demonstration to the jury, now seeks a second trial. They have indicated they will not proceed on the intentional portion of the indictment, but rather the wanton charge, ostensibly in an attempt to avoid introduction of the domestic violence evidence at a second trial. The prosecution wants a second trial, a second chance to seek to prove the petitioner guilty

before a different jury. Judicial fairness mandates that this Court act to precluded the second trial and not subject the petitioner to the stress, cost and anguish of a second trial by jury. As the trial judge warned, jeopardy may attach. Jeopardy has attached. The need for the Court to act now to prevent this gross miscarriage of justice is also particularly great in light of the disparity that now exists among the states.

II. THE KENTUCKY SUPREME COURT'S HOLDING THAT A DEFENDANT MUST TESTIFY TO INTENTIONALLY KILLING THE DECEDENT IN ORDER TO INTRODUCE SELF-DEFENSE EVIDENCE OF PRIOR DOMESTIC VIOLENCE ABUSE VIOLATES THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY AND CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

In its opinion, the Kentucky Supreme Court held that the Petitioner was not entitled to present the defense of self-defense to the jury because she did not admit to intending to commit the act. The Court held that in an unwitnessed killing, a defendant would need to testify that she intentionally killed the deceased while in fear of serious bodily harm or death in order for a trial court to be permitted to properly instruct a jury on self defense. This holding clearly conflicts with the Fifth and Sixth Amendments of the

Constitution of the United States which states that a person shall not be compelled in any criminal case to be a witness against himself, but giving each person the right to present her defense(s). In effect the ruling essentially requires the petitioner to surrender her constitutional right to remain silent in order to protect her constitutional right to present every valid and reasonable theory for her defense.

The Kentucky Supreme Court's decision conflicts with other recent decisions from other state courts. In Williams v. State, 915 P.2d 371 (OK 1996) the Oklahoma Court held that a trial court ruling that a defendant was required to take the stand before any claim of self-defense could be presented to the jury was unconstitutional because it required a defendant to surrender his constitutional right not to testify in his own defense. In Williams, like the petitioner's case, the trial court was compelling every defendant who asserted self-defense as a defense to affirmatively put

forth personal testimony of his intent to act, thereby waiving any right to remain silent. As the appellate courts of Oklahoma correctly recognized such a ruling by the trial court was unconstitutional because a trial court cannot explicitly or effectively force a defendant to choose between his or her Sixth Amendment right to present a defense and his or her Fifth Amendment right not to testify.

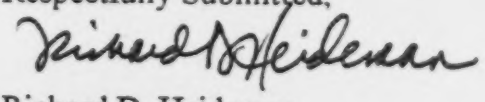
The Oklahoma ruling conflicts most directly with an Ohio Supreme Court decision, State v. Seliskar, 498 NE2d 582 (OH 1973) which held that defendants claiming self-defense must testify and waive their constitutional right to remain silent if no other evidence is available to establish that defense. In addition in State v. Kutnyak, 685 P.2d 901 (MT 1984), the Montana court held that if a defendant desires to raise self-defense, then as an affirmative defense it cannot be proved without the defendants own testimony.

The Court should grant the writ of certiorari to resolve this constitutional conflict between the fifth and sixth amendments and the conflict between the states regarding the rights of defendants and their competing constitutional rights in presenting all valid defenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



Richard D. Heideman
The Heideman Law Group, P.C.
1714 N Street, N.W.
Washington, DC 20036
(202) 462-8990

Counsel of Record for Petitioner Christina M. Grimes

APPENDIX

SUPREME COURT OF KENTUCKY

95-SC-745MR

CHRISTINA M. GRIMES

APPELLANT

v. APPEAL FROM AN ORIGINAL ACTION
IN COURT OF APPEALS
95CA-001487

WILLIAM E. McANULTY, Judge Jefferson Circuit Court
APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

Rendered October 2, 1997

OPINION OF THE COURT BY JUSTICE GRAVES

AFFIRMING

Appellant, Christina Grimes, appeals as a matter of

right from an order of the Court of Appeals denying her petition for a writ of prohibition. In her petition, Appellant seeks to prevent a retrial of her murder indictment on the grounds of double jeopardy. After hearing oral arguments and reviewing the record, we affirm the Court of Appeals.

James Grimes was shot to death in his home in Jefferson County on July 2, 1992. His wife, Appellant, was accused of causing his death and was charged with murder. A trial by jury was held in the Jefferson Circuit Court from July 12 through July 22, 1994. Appellant was the last witness to testify in her defense. At the conclusion of her direct examination the Commonwealth moved for a mistrial and, over the objection of Appellant the motion was granted. When the trial judge proposed to schedule a new trial date, Appellant petitioned the Court of Appeals for a writ of prohibition, claiming retrial would cause her "for the same offense to be twice put in jeopardy of life and limb." U.S. Const. amend. V; Ky. Const. § 13. The Court of Appeals denied the petition and Appellant appealed to this Court as a matter of right. Ky. Const. § 115.

A writ of prohibition is akin to mandamus, which may only be granted when no other adequate remedy by appeal

exists and, absent relief, a great injustice will occur. Haight v. Williamson, Ky., 833 S.W.2d 821 (1992), cert. denied, 507 U.S. 925, 113 S.Ct, 1296, 122 L.Ed.2d 687 (1993). In Macklin v. Ryan, Ky., 672 S.W.2d 60 (1984), this Court established that such a writ is appropriate when an accused is seeking protection from a retrial when a mistrial was inappropriately ordered. "Since a mistrial, by definition, does not dispose of the merits of a case or necessarily preclude future litigation, the appellant did not have an adequate remedy by appeal from the mistrial order." Id. at 61.

The constitutional proscription against double jeopardy protects citizens inter alia from being prosecuted again for an offense for which a former prosecution resulted in either an acquittal or a conviction which has not been subsequently set aside. KRS 505.030(1). If, as here, the former prosecution was terminated by mistrial after the first witness was sworn and before the verdict was rendered, a retrial is precluded if the mistrial was granted without the defendant's consent and in the absence of a manifest necessity to do so. KRS 505.030(4); Nichols v. Commonwealth, Ky., 657 S.W.2d 932 (1983), cert. denied, 465 U.S. 1028, 104 S.Ct. 1289, 79 L.Ed.2d 691 (1984).

The concept of "manifest necessity" was first enunciated in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824). It recognizes the right of a defendant to have a trial completed by a particular tribunal which has been duly and legally selected to try him. Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949); Baker v. Commonwealth, 280 Ky. 165, 132 S.W.2d 766, 768 (1939). " [I]n the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." United States v. Jorn, 400 U.S. 470, 486, 91 S.Ct. 547, 588, 27 L.Ed.2d 543 (1971), The most common example of "manifest necessity" to grant a mistrial is when a jury is deadlocked and unable to reach a verdict. E.g., Skaggs v. Commonwealth, Ky., 694 S.W.2d 672 (1985), cert. denied, 476 U.S. 1130, 106 S.Ct. 1998, 90 L.Ed.2d 678 (1986); Nichols v. Commonwealth supra; Commonwealth v. Crooks, Ky., 655 S.W.2d 475 (1983). However, it has also been found to exist when the defendant introduces improper evidence which prejudices the

Commonwealth's right to a fair trial. Chapman v. Richardson, Ky., 740 S.W.2d 929 (1987); Stacy v. Manis, Ky., 709 S.W.2d 433 (1986).

In reviewing a decision to grant a mistrial, the trial court must have a measure of discretion. "The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that at any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred." Arizona v. Washington, 434 U.S. 497, 513, 98 S.Ct. 824, 834, 54 L.Ed.2d 717 (1978). Furthermore, "[t]he adoption of a stringent standard of appellate review in this area . . . would seriously impede the trial judge in the proper performance of his 'duty, in order to protect the integrity of the trial . . .'" Id. (Quoting United States v Dinitz, 424 U.S. 600, 612, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976))

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of

> the juror. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

Washington, supra, at 513, 98 S.Ct. at 834 (quoting Wade, supra, at 687, 69 S.Ct. at 836).

Because a constitutionally protected interest is inevitably affected by any mistrial decision, the trial judge must exercise "sound discretion" in declaring a mistrial. Perez, supra.

In his written order, the trial judge explained that there was a manifest necessity to discharge the jury because of the introduction by Appellant of voluminous evidence of the victim's prior acts of domestic violence and abuse directed against Appellant and her children. The judge stated that the admissibility of such evidence was conditionally predicated upon a showing that Appellant acted in self-defense. KRS 503.050(3). However, at the close of Appellant's testimony the court concluded that Appellant had only established that the shooting was accidental, and thus was not entitled to introduce evidence of the victim's prior bad acts.

> This Court could not have required the defendant to disclose her ultimate testimony prior to taking the witness stand nor could this Court have required her to testify prior to offering any other proof. However,

> having now testified that she did not intend to fire the gun, i.e. it was an accident, the entire offer of proof of specific acts of domestic violence, not only becomes irrelevant, but inflammatory. The Court, prior to defendant's presentation of her defense, could not have precluded her offer. However, at this point having heard her testimony the Court now finds that her offer of proof in support of self defense was a subterfuge to avoid the restrictions on character evidence otherwise applicable.

The Court concluded that the admission of the evidence was prejudicial to the Commonwealth, in that it conveyed to the jury that the "victim deserved to die", and therefore no remedy other than a mistrial was adequate.

Thus, in deciding whether a manifest necessity did, in fact, exist to justify a mistrial in this case, we must necessarily decide whether the evidence presented at trial would have supported an instruction on self-protection. Specifically, is an accused entitled to the defense of self-protection notwithstanding her testimony that the victim's death was the result of the unintended discharge of a weapon?

Appellant relies primarily on this Court's decision in Pace v. Commonwealth Ky., 561 S.W.2d 664 (1978). In Pace, the defendant was indicted for the shooting death of her husband. The defendant testified at trial that she and her

husband were fighting over the gun when it accidentally discharged. She further testified that the victim had threatened to kill her and her daughter. The trial court refused to give a self-defense instruction in light of defendant's testimony of the accidental discharge. This Court reversed the conviction, holding that despite defendant's testimony of accident, where other evidence is introduced indicating the defendant could have also acted in self-defense, a self-defense instruction is warranted. Id. at 667.

We perceive marked differences between Pace and the present case. Notably, although the defendant in Pace testified that the shooting was accidental, other testimony presented established that prior to the incident, defendant had told a relative that she had thrown a glass at the victim during an argument and "If he keeps on, I'm going to kill him." Further, the defendant had initially informed authorities that the victim killed himself. Thus, despite the defendant's ultimate testimony that the shooting was accidental, other evidence presented at trial supported the possibility that she intentionally shot her husband.

Here, we find nothing in the testimony and evidence presented to support a finding that Appellant intentionally

shot her husband. During voir dire, defense counsel informed the jury that Appellant's defense would be accident. During opening statements, counsel again stated that Appellant was a "victim of accident." In the 911 tape which was introduced, Appellant said, "I just shot my husband . . . on accident," EMS tapes, which were also introduced, contained Appellant's statements that "He told me to shoot him", "I didn't know it was loaded", and "I didn't mean to." Officer James Gray, who was the first to arrive at the scene, testified that Appellant told him the victim gave her the gun and told her to shoot him. She told Officer Gray, "I never even knew it was loaded or nothing" and "I don't know anything about guns or any shooting or anything like this."

When Appellant took the witness stand, she recounted the victim's abuse of her and her children. Defense counsel elicited information concerning bad acts of the victim from the 1970's up until the time of his death. Finally, Appellant described the events of July 2, 1992. She stated that she and her husband had a conversation at their home regarding a telephone number that she had found on his beeper. They talked for awhile and then he left for a period of about four hours. According to Appellant, when her husband returned,

he attacked her and dragged her outside to the patio. He then returned to the house. Appellant testified that she asked her husband where his gun was, because she knew he usually carried it with him at all times. Appellant's husband went to the kitchen, got the gun and brought it back. Appellant testified,

> I put my hand out and I said, 'Please let me have the gun, let me have the gun.' And he put the gun in his [left] hand and he turned it around [toward himself]...and all I did was went like this [reaching for the gun] and it went off. I fell back after he put the gun in my hand . . . and it went off.

Appellant testified that she thought her husband was playing a game when he fell; she did not realize he had been shot until she saw the blood.

A defendant is entitled to have the jury instructed on the merits of any lawful defense which he or she has. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988); Curtis v. Commonwealth, 169 Ky. 727, 184 S.W. 1105 (1916). However, the entitlement to an affirmative instruction is dependant upon the introduction of some evidence justifying a reasonable inference of the existence of a defense. Brown v.

Commonwealth, Ky., 555 S.W.2d 252, 257 (1977); Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977), overruled on other grounds, Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981).

After reviewing the evidence and testimony presented, we are of the opinion that nothing was presented to indicate that Appellant acted in self-defense. We recognize that our holding in Pace, supra, may be read to authorize a self-defense instruction notwithstanding a defendant's claim of accident. "The mere fact that these defenses are inconsistent . . . should not preclude a jury from considering both theories under appropriate circumstances." Id. at 666. However, despite the fact that the defendant's testimony in Pace rested on accident, other evidence introduced created an issue as to whether she acted in self-defense. That simply is not the case here. Therefore, we conclude the trial judge acted well within his discretion in determining that the introduction of prior bad acts of the victim, in the absence of any evidence of self-defense, was so inflammatory and prejudicial as to create a manifest necessity for mistrial. We again defer to the language set forth in Arizona v. Washington, supra,

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" . . . the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind.

Id. at 515-516, 98 S.Ct. at 835.

In this opinion we have concluded that the trial judge appropriately determined the law under Pace, supra, and, although inconsistent defenses could have been appropriate, such was not the case given the evidence presented. However, it is our opinion that the holding of Pace is fundamentally flawed. A defendant who affirmatively asserts the defense of accident cannot also claim self-protection.

Prior to our decision in Pace, this Court had repeatedly affirmed the general principle that when a defendant in a homicide prosecution admits the killing, but claims it was an accident, he is not entitled to a self-defense instruction. Howard v. Commonwealth, Ky., 240 S.W.2d 616 (1951);

Howard v. Commonwealth, 260 Ky. 467, 86 S.W.2d 126 (1935); Pelfry v. Commonwealth, 247 Ky. 484, 57 S.W.2d 474 (1933); and Maiden v. Commonwealth 203 Ky. 446, 262 S.W. 588 (1924). By its very nature, self-defense relates to an intentional or knowing use of force and not an accidental shooting. "In Kentucky we have long recognized as fundamental that when the accused has 'admitted the shooting' and then 'attempted to justify it on the grounds of self protection . . . there is no evidence that his actions were anything other than intentional.'" McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 521 (1994) (quoting Shannon v. Commonwealth, Ky., 767 S.W.2d 548, 548-549 (1988)). Pursuant to self-defense the defendant admits, but seeks to justify, the intentional commission of the act, whereas the essence of an accident defense is the defendant's contention that he did not intentionally commit the act the state alleges constitutes a crime.

We are persuaded by the rationale of Justice Stephenson in his dissent to the Pace opinion,

> Particularly as here in an unwitnessed killing, I do not believe that there is a rational basis for a jury to infer self-defense where the defendant herself testified that

> the killing was accidental and did not testify that she intentionally killed the deceased in fear of serious bodily harm or death at his hands. Accident is involuntary; self-defense is intentional. It is recognized by all that these defenses are contradictory.

Id. at 670.

Stephenson further opined that,

> The majority opinion will impose an intolerable burden upon the trial bench in attempting to determine if the circumstances of cases such as this warrant a self-defense instruction. The practical solution to this problem will undoubtedly result in the various trial courts' giving a self-defense instruction if requested in every case where death resulted during the course of a struggle or altercation.

Id.

We therefore conclude that the defenses of self-defense and accident are "mutually exclusive, the former contemplating an intentional act leading to death while the latter negatives such intention." Id. at 671. A defendant cannot assert accident yet alternatively claim an intentional act done in self-defense, without affirmatively presenting evidence of self-defense. Therefore, we overrule Pace.

The decision of the Court of Appeals denying Appellant's writ of prohibition is affirmed. Retrial of Appellant under the murder indictment is not barred under the principles of double jeopardy.

Graves, Johnstone, Lambert and Wintersheimer, J.J., concur. Johnstone, J., concurs by separate opinion in which Graves, and Lambert, J .J., join. Cooper, J., dissents by separate opinion in which Stumbo, J., joins. Stephens, C.J., dissents separately without an opinion.

SUPREME COURT OF KENTUCKY

95-SC-745MR

CHRISTINA M. GRIMES

APPELLANT

v. APPEAL FROM AN ORIGINAL ACTION IN COURT OF APPEALS 95CA-001487

WILLIAM E. McANULTY, Judge Jefferson Circuit Court

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

Rendered October 2, 1997

CONCURRING OPINION BY JUSTICE JOHNSTONE

I concur in the majority but take issue with the dissenting opinion.

The dissenting opinion advocates, with much emotion, that the Kentucky Legislature has given victims of spouse abuse certain rights which they may assert in defense of assault and other crimes including murder. It is suggested that the majority opinion erodes such protection and essentially "emasculate[s] the presumption of innocence." However, it is unlikely that the Legislature intended to grant victims of spousal abuse the unfettered right to retaliate without consequence.

The dissenting opinion's assertion that the majority opinion "represents not only an erosion of [the] progress, but a opinion significant and unconstitutional retreat" is unfounded. The dissenting opinion is quick to point out that a defendant is entitled to an instruction on any defense which the evidence tends to establish, whether supported by the defendant's evidence or the Commonwealth's. However, in this case, the inescapable fact relied upon by the majority is that, despite the overwhelming evidence of spousal abuse on the part of the victim, there was absolutely <u>no</u> evidence of self-defense by Appellant. Appellant's statements to police indicated that she accidentally shot her husband. Further, Appellant testified at

trial that the gun "just went off" and she did not even realize her husband had been shot until she saw blood. At no point, prior to or during trial, did Appellant ever contend that she intentionally fired the gun in self-defense out of fear for her life. At best, under Appellant's and the dissenting opinion's strained interpretation of her statements immediately after the incident, one could reach the conclusion that Appellant intentionally, although not in self-defense, shot her husband.

Whereas a defendant under some circumstances may be entitled to both an instruction on self-defense and accident, the evidence in this case clearly did not support an instruction on self-defense. The dissenting opinion misconstrues the majority opinion in concluding that it stands for the proposition that a defendant must specifically claim to have acted in self-defense. Rather, the majority holds that there must be some evidence introduced to support the instruction. Evidence of the victim's abuse of Appellant, standing alone, does not satisfy that burden. Indeed, the trial court was correct in finding that the admission of the evidence conveyed to the jury that the "victim deserved to die."

The right of the people of Kentucky to a jury verdict

finding this defendant guilty or not guilty would be utterly denied by the opinion voiced in the dissent. Under the dissent's analysis, the defendant would walk away without ever having faced a jury verdict notwithstanding the very substantial evidence that she murdered her husband. The rule which would emerge from the dissent is that the Commonwealth must never move for a mistrial for if some appellate court later thinks the trial court got it wrong, regardless of the reasoning which prompted the order of mistrial, retrial would be precluded.

In ruling on the motion for mistrial, the trial judge was in the unique position to serve as a fact finder and assess the factors relevant to the determination of whether a mistrial was indeed appropriate. At this stage of the proceedings, in the absence of a crystal ball, we should not circumvent the well-reasoned judgment call of the trial judge in granting a mistrial. It is evident from the opinion and order that the judge exercised sound discretion in reaching such decision.

While the dissent paints the majority opinion as discarding "oft-cited and highly respected precedent," it completely ignores the fact that the trial judge and a unanimous panel of the Kentucky Court of Appeals reached

the same conclusion as the majority of this Court. Appellant will have her day in court during which she can present her defenses in an appropriate manner. At that stage, it is up to the jury to pick and choose which parts of her statements to believe. Although it is easy to sympathize with Appellant's situation, our system dictates that the Commonwealth has the same right to a fair trial as does a defendant. Clearly, this did not occur in the original proceedings and retrial is necessary.

Graves and Lambert, JJ., join this concurring opinion.

SUPREME COURT OF KENTUCKY

95-SC-745MR

CHRISTINA M. GRIMES

APPELLANT

v. APPEAL FROM AN ORIGINAL ACTION IN COURT OF APPEALS 95CA-001487

WILLIAM E. McANULTY, Judge Jefferson Circuit Court

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

Rendered October 2, 1997

DISSENTING OPINION BY JUSTICE COOPER

In Commonwealth v. Rose, Ky., 725 S.W.2d 588 (1987), cert. denied, 484 U.S. 838 (1987), a prosecution of a

battered wife for the murder of her deceased husband, we authorized introduction of evidence regarding the "battered wife syndrome" to explain why a person suffering from that syndrome would perceive that certain conduct was necessary in her self-defense, even though one not suffering from that condition might believe or behave otherwise. In 1992, as part of a package of legislation intended to improve the plight of battered spouses, the General Assembly amended the self-protection statute to authorize the introduction of evidence of prior acts of domestic violence and abuse perpetrated against the defendant by the alleged victim of a homicide or assault. KRS 503.050(3) (1992 Ky. Acts ch. 173 § 2). Thus was the existence of a sordid family secret rescued from the dark ages of criminal jurisprudence. Finally, a battered spouse was entitled to the same presumption of innocence and due process of law afforded to the most hardened of criminals. The majority opinion rendered in this case represents not only an erosion of that progress, but a significant and unconstitutional retreat.

1.

The majority correctly notes that a mistrial can be

granted in a criminal prosecution over the defendant's objection only if there exists a manifest necessity to do so, KRS 505.030(4), United States v. Perez, 22 U.S. (9 Wheat.) 5709, 580, 6 L.Ed. 165, 166 (1824), Nichols v. Commonwealth, Ky., 657 5 W.2d 932 (1983), cert. denied, 465 U.S. 1028 (1984), and that one example of "manifest necessity" is when the defendant introduces improper evidence which prejudices the prosecution's right to a fair trial. Chapman v. Richardson Ky., 740 S.W.2d 929 (1987); Stacy v. Manis, Ky., 709 S.W.2d 433 (1986). Of course, it is a corollary to this principle that if the evidence was properly admitted, Taylor v Dawson, 888 F.2d 1124 (6th Cir. 1989), cf. Leibson v. Taylor, Ky., 721 S.W.2d 690 (1986), overruled on other grounds, Shaffer v. Morgan, Ky., 815 S.W.2d 402 (1991) , or if the evidence did not prejudice the Commonwealth's case Lillard v. Commonwealth, Ky., 267 S.W.2d 712 (1954), then the discharge of the jury was without manifest necessity and a retrial is precluded by the constitutional proscription against double jeopardy. It is suggested in Justice Johnstone's concurring opinion that an erroneous grant of a mistrial ought not preclude a retrial if the

error was (as here) the result of an honest mistake. However, there is no "good faith" exception to the constitutional requirement of "manifest necessity." The two concepts are mutually exclusive. If the trial judge "got it wrong," double jeopardy applies.

The issue then becomes whether evidence of the deceased's prior acts of domestic violence and abuse directed against Appellant and her children was rendered inadmissible and prejudicial nunc pro tunc by Appellant's failure to specifically testify that she killed her husband intentionally in self-protection.

2.

In its case in chief, the Commonwealth presented evidence to prove the offense of murder, i.e., that Appellant intentionally shot and killed her husband. To this end, the Commonwealth introduced the 911 tape in which Appellant first stated, "I just shot my husband." This was followed by the EMS tape in which Appellant stated that her husband handed her the gun and told her to shoot him, and that, although she did not believe the gun was loaded, she pulled the trigger. A tape recorded statement of Appellant was

introduced in which she stated that she pulled the trigger. Officer James Gray, the first officer on the scene, testified that Appellant told him, "He gave me the gun and told me to shoot him and I did." Officer Charles Grider testified that Appellant told him that her husband handed her the gun and said if you don't believe me, just shoot me, and she shot him.

At the conclusion of the Commonwealth's case, Appellant moved for a directed verdict of acquittal on grounds that the Commonwealth's evidence was insufficient to prove that her husband's death was the result of an intentional act. The trial judge correctly ruled that the Commonwealth's evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the killing was intentional. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). The Commonwealth having introduced sufficient evidence of intent to overcome a directed verdict, it was no longer necessary for anyone, especially Appellant, to introduce additional evidence to prove that she intentionally killed James Grimes.

Appellant began her case with voluminous evidence of

the deceased's prior acts of domestic violence and abuse perpetrated against Appellant and her children. These included separate incidents in which he personally threatened them with a handgun. Dr. Anna Wilson testified as an expert witness that, in her opinion, Appellant was suffering from the "battered spouse syndrome." The law of Kentucky is clear that if Appellant had at this point chosen not to testify in her own behalf, the evidence introduced by the Commonwealth and Appellant's other witnesses would have sufficed to entitle her to an instruction on self-protection.

> Concerning the question of whether or not the appellant was entitled to an instruction on self-defense, we find that in cases of this character the court is required to give such an instruction where the evidence is wholly circumstantial, there is evidence of a struggle, and the accused fails to testify, or, although he does become a witness, he does not testify as to any facts indicating the manner in which the deceased met death.

Hasty v. Commonwealth, Ky., 272 S.W.2d 325, 326 (1954); see also, Pennington v Commonwealth, Ky., 344 S.W.2d 407 (1961); Benson v. Commonwealth, 290 Ky. 713, 162 S.W.2d 538 (1942); Rutherford v. Commonwealth, 76 Ky. (13 Bush)

608 (1878). However, Appellant did choose to testify in her own defense.

Appellant also testified to the deceased's prior acts of domestic violence and abuse. These included a prior incident in which the deceased actually fired his weapon at her five or six times. Appellant then related the incidents leading up to the fatal shooting on July 2, 1992. She testified that her husband stripped her naked and dragged her outside by her hair. She then crawled back into the house to find her husband in the living room. The deceased retrieved his loaded gun from a cabinet and began pointing the gun first at Appellant and then at himself, threatening both of their lives. Appellant testified that she feared for her life and begged her husband to give her the gun. Her description of the fatal event was as follows:

> I put my hand out and I said, "Please let me have the gun, let me have the gun;" and he put the gun in my hand with it turned around [toward him] - And all I did was, I went like that and it went off.

Appellant also introduced photographs of bruises on her body alleged to have been inflicted upon her by the

deceased on the night of the fatal incident. At no time during her testimony did Appellant describe the killing as either "accidental" or "intentional," although she admitted telling her daughter and other witnesses on the day of the incident that the shooting was an accident. Seizing upon this admission and ignoring the fact he had already ruled that the Commonwealth, itself, had introduced sufficient evidence of an intentional killing to avoid a directed verdict of acquittal, the trial judge ruled that Appellant could not claim "accident" and still be entitled to an instruction on self-protection. Having reached that erroneous conclusion, the trial judge found that all of the evidence of prior abuse was irrelevant and that its introduction created a "manifest necessity" for a mistrial.

3.

Recognizing that the trial judge's decision in this case was directly contrary to the holding in Pace v. Commonwealth, Ky., 561 S.W.2d 664 (1978), the majority routinely discards that oft-cited and highly respected precedent, see, e.g., 15 ALR 4th 983, 1011 (1982), L. West, Kentucky Law Survey (Criminal Law), 74 Ky. L.J. 403, 406,

n. 27 (1986), and holds that a defendant (1) cannot claim inconsistent theories, i.e., accident and self-protection, and (2) cannot claim self-protection without specifically admitting that she intentionally killed the deceased. In other words, although the Commonwealth can proceed on alternative theories, e.g., Bedell v. Commonwealth, Ky., 870 S.W.2d 779 (1993), Wells v. Commonwealth, Ky., 561 S.W.2d 85 (1978), the defendant cannot; and although the Commonwealth can prove its case by circumstantial evidence, e.g., Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990), Nugent v. Commonwealth, Ky., 639 S.W.2d 761 (1982) , the defendant cannot prove a defense by circumstantial evidence, but must prove it by her own affirmative testimony. If that is to be the law of this Commonwealth, we have effectively emasculated the presumption of innocence.

4.

In Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895), the United States Supreme Court traced the roots of the presumption of innocence from Deuteronomy through Roman law, English common law, and the common law of the United States.

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

Id., 156 U.S. at 453, 15 S.Ct. at 403.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976). It has been called the "golden thread" that runs throughout the criminal law, the "cornerstone of Anglo-Saxon justice," and the "focal point of any concept of due process." S. Sundby, The Reaonable Doubt Rule and the Meaning' of Innocence, 40 Hastings L.J. 457 (1989). Since the rendition of Taylor v. Kentucky, 436 U.S. 478, 483, 98 S.Ct. 1930, 1933-34, 56 L.Ed.2d 468 (1978), every jury in every criminal case tried in Kentucky is instructed that "[t] he law presumes a defendant to be innocent of a crime [and] [y]ou shall find the defendant not guilty unless you are satisfied from the evidence alone and beyond a reasonable doubt that he is guilty." RCr 9.56(1).

At the heart of the presumption of innocence is the requirement that the state must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Although a state may determine for itself what are the elements of a criminal offense or of a defense thereto, Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), once the state has decided that a fact is so important that it must be proven or presumed, any shifting of the burden of proof to the defendant is a violation of the Due Process Clause. Id., 432 U.S. at 215, 97 S.Ct. at 2329. Our legislature has determined that once evidence is introduced which would justify an instruction on a defense such as self-protection, the Commonwealth has the burden to disprove it beyond a reasonable doubt, and its absence becomes an element of the offense. KRS 500.070(1) and 1974 Commentary thereto; cf. Brown v. Commonwealth Ky., 555 S.W.2d 252, 257 (1977); Cooper, 1 Kentucky Instructions to Juries, § 11.07 (Comment) . The burden of proof is assigned by including in the instruction on the charged offense the element "That in so

doing, he was not privileged to act in self-protection." E.g., Cooper, supra, § 3.21.

5.

To justify an instruction on a defense, it is not necessary that the evidence would prove the defense beyond a reasonable doubt, or even by a preponderance of the evidence, but only that which could justify a reasonable doubt of the defendant's guilt. Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977), overruled on other grounds, Payne v. Commonwealth, Ky., 623 S.W.2d 867 (1981) , cert. denied, 456 U.S. 909 (1982). Pace v. Commonwealth, supra, was not the first case to hold that a defendant is entitled to an instruction on any defense which the evidence tends to establish, whether supported by the defendant's evidence or that of the Commonwealth. See, e.g., Smith v. Commonwealth, 262 Ky. 6, 89 S.W.2d 3 (1936); Vick v. Commonwealth, 236 Ky. 436, 33 S.W.2d 297 (1930). Nor was it the first case to hold that a defendant may be entitled to an instruction on self-protection, despite his own testimony that the killing was accidental. Gatliff v. Commonwealth, 32 K.L.R. 1063, 107 S.W.739 (1908). The line of cases cited by

the majority in support of the proposition that claims of accident and self-protection are incompatible are easily distinguished. As Chief Justice Palmore pointed out in his concurring opinion in Pace, supra, at 668, the evidence in none of those cases would have justified an instruction on self-protection, none of them overrules Gatliff, supra, and all of them were decided prior to the adoption of the penal code at a time when the defendant had the burden of proof on the issue of self-protection.

Pace and Gatliff also are in accord with the enlightened majority of jurisdictions which permit a defendant to claim accident and self-protection as alternative theories. E.g., People v. Brooks, 474 N.E.2d 1287 (Ill. App. Ct. 1985); State v. Hill, 744 P.2d 1228 (Kan. 1987); Commonwealth v. Wilson, 639 A.2d 1194 (Pa. Super. 1994); Merritt v. State, 213 S.W. 941 (Tex. Crim. App. 1919). In State v. Eldridg, 554 S.W.2d 422 (Mo. Ct. App. 1977), the defendant was permitted to rely on both theories where the evidence would support either theory and the defendant, as here, did not specifically testify that the killing was accidental. On the issue of the necessity of direct evidence to prove self-protection, the

Court held as follows:

> In the absence of direct evidence that appellant intentionally shot and killed Davis the State had to rely upon circumstantial evidence of the fact. If the state is entitled to go to the jury on the circumstantial evidence of a voluntary shooting with intent to kill, the appellant is likewise entitled to submit a circumstantial case of voluntary shooting in self-defense. What is sauce for the goose is sauce for the gander.

Id. at 425; compare State v. Hafeli, 715 S.W.2d 524 (Mo. Ct. App. 1986), in which the defendant specifically testified that the killing was accidental.

Finally, it has never been the law of this Commonwealth that in order to be entitled to an instruction on self-protection, the defendant must specifically claim to have acted in self-defense. In Alsip v. Commonwealth, Ky., 482 S.W.2d 571 (1972), an instruction on self-protection was held required by other evidence where the defendant did not testify that he acted in self-defense, but claimed he had no recollection of what happened after he was struck by the victim. And in both Brown v. Commonwealth, 308 Ky. 486, 214 S.W.2d 1018 (1948) and Hamilton v Commonwealth, 300 Ky. 246, 188 S.W.2d 435 (1945), the defendants were held

entitled to instructions on self-protection despite the fact that both denied killing their alleged victims and claimed alibis.

6.

Although precedent can be overruled with four votes and the stroke of a pen, no court has authority to set aside the jurisprudential cornerstones of due process and the presumption of innocence. Despite the fact that our legislature has seen fit to place the burden of proof of self-protection on the Commonwealth, the majority of this Court now holds that a defendant must affirmatively prove that defense by his or her own testimony and cannot rely on circumstantial evidence or even evidence produced by the Commonwealth. In so doing, we have stripped Appellant of the presumption of innocence and thereby denied her the Constitutional right to due process of law. Patterson v. New York, supra.

Appellant was entitled to an instruction on self-protection. Thus, she was entitled to introduce evidence of her husband's prior acts of domestic violence and abuse and there was no manifest necessity to grant a mistrial. Since her

retrial is precluded by the Constitutional proscription against double jeopardy, the writ of prohibition should be granted.

Stumbo, J., joins this dissent.

SUPREME COURT OF KENTUCKY

95-SC-745MR

CHRISTINA M. GRIMES

APPELLANT

v. APPEAL FROM AN ORIGINAL ACTION IN COURT OF APPEALS 95CA-001487

WILLIAM E. McANULTY, Judge Jefferson Circuit Court

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing filed by Appellant is hereby DENIED.

Stephens, C.J., and Graves, Johnstone, Lambert and

Wintersheimer, JJ., concur. Cooper and Stubo, JJ., would grant the Petition for Rehearing.

Entered: January 22, 1998.

/s/ Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

95-CA-1487-OA

CHRISTINA M. GRIMES

PETITIONER

ORIGINAL ACTION IN
COURT OF APPEALS REGARDING
JEFFERSON CIRCUIT COURT

v.

WILLIAM E. McANULTY, Judge Jefferson Circuit Court

APPELLEE

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

Before LESTER, Chief Judge; GARDNER AND JOHNSON, Judges.

This Court, having considered the petition for writ of prohibition and the response thereto, and being otherwise sufficiently advised, ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: July 18, 1995

/s/ John A. Gardner
Judge, Court of Appeals

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

94-CA-1849-MR

CHRISTINA M. GRIMES

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT
COURT ACTION NO. 92-CR-1992

v.

COMMONWEALTH OF KENTUCKY

APPELLEE

ORDER

Before LESTER, Chief Judge; SCHRODER and GARDNER, Judges.

Having considered appellee's motion to dismiss and response thereto, and being otherwise sufficiently advised, the Court ORDERS the motion be GRANTED and this appeal is

hereby DISMISSED.

Entered: 12/13/94

/s/ William Schroder
Judge, Court of Appeals

JEFFERSON COUNTY CIRCUIT COURT
THIRD DIVISION

NO. 92CR1992

COMMONWEALTH OF KENTUCKY

PLAINTIFF

v.

CHRISTINA M. GRIMES

DEFENDANT

ORDER

The issue before this court is whether the defendant's offer of proof to the jury in this case of acts of domestic violence pursuant to KRS 403.720 without proof that the defendant intended to shoot the victim, requires that granting of a mistrial. At the conclusion of the defendant's direct examination, counsel for the Commonwealth moved the Court to declare a mistrial based upon manifest necessity. Defendant objected tot he Motion and urged the Court to permit the trial to continue.

Ordinarily in a criminal prosecution, the character of the victim is not a relevant area of inquiry by either party. However, a limited use of evidence regarding the character of the a criminal victim is allowed. In cases involving the defense of self-defense (self-protection) a defendant may prove that he was confronted with aggression by showing that his victim was a person of violent character. As provided in KRE 404:

> (a) evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion except:
>
> . . . (2) character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused . . .

Clearly, the above exception permits a defendant to offer evidence of violence to establish that the victim was the initial aggressor. Thereafter the Commonwealth may offer evidence of a character trait of peacefulness of the victim.

Turning to the provisions of the Penal Code relating to the self protection defense, KRS 503.050 subsection (3)

provides as follows:

> Any evidence presented by the defendant to establish the existence of a prior act or acts of domestic violence and abused as defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force shall be admissible under this section. (Emphasis supplied.)

"Under this section" can only relate to the defense of self-protection. It is not an open-ended opportunity to offer specific bad acts evidence, absent the predicate that the defendant intentionally fired the gun. To permit evidence of domestic violence to be interjected into a case wherein the defendant offers that the death of the victim was the result of an accident explains nothing and leads only to the inescapable conclusion that the victim "deserved to die." Lacking a sufficient nexus, the prejudice is obvious.

This Court could not have required the defendant to disclose her ultimate testimony prior to taking the witness stand nor could this Court have required her to testify prior to offering any other proof. However, now having testified that she did not intend to fire the gun, i.e. it was an accident, the